YUSSERI SAID v. TEX CYCLE TECHNOLOGY (M) BHD

HIGH COURT MALAYA, KUALA LUMPUR
HUE SIEW KHENG J
[SUIT NO: 22NCVC-1469-12-2012]
7 JANUARY 2014

COMPANY LAW: *Directors – Resignation – Board of Directors resolution passed to make company dormant and directors to relinquish positions – Claim for compensation by director – Whether compensation provided for in company's resolution – Whether compensation payable in accordance with labour law – Whether entitled to reasonable compensation under ss. 137(5)(d) and s. 128(7) of Companies Act 1965*

CIVIL PROCEDURE: *Action – Res judicata – Filing of two separate suits seeking same reliefs – Whether pleadings similar – Whether satisfactory reason provided for filing two actions – Whether res judicata applied*

The plaintiff was a shareholder and director of the defendant and a shareholder and the executive director of Metro Koats Technology Sdn Bhd ('MKT'), a wholly owned subsidiary of the defendant. At a special Board of Directors ('BOD') meeting held by the defendant, it was decided, *inter alia*, that MKT be made a dormant company and the plaintiff resign as an executive director of MKT and any compensation payable would be in accordance with labour law. Subsequently, a resolution was passed to implement the decisions of the BOD meeting and the plaintiff and his co-director had willingly resigned. The plaintiff subsequently filed the present suit against the defendant company contending that: (i) there was an implied contract between the plaintiff and the defendant whereby, in consideration of the plaintiff peacefully relinquishing his executive position in MKT, he would be compensated in accordance with labour law by the defendant; (ii) he was entitled to RM500,000 being reasonable compensation; and (iii) alternatively he was entitled to reasonable compensation pursuant to of the Companies Act 1965 ('the Act'). There was however, an earlier suit filed by MKT against the plaintiff ('1246 suit') for the return of the company car which the plaintiff had refused to surrender. In that suit, the plaintiff counter claimed for compensation of RM500,000 and the sum of RM45,254.75 being monies owing to the directors of MKT. The court, in the 1246 suit had ordered the return of the company car and payment of the sum of RM45,254.75 to the plaintiff and dismissed the plaintiff's counterclaim. The issues to be tried in the instant case were: (i) whether the defendant had an obligation to compensate the plaintiff and was the payment contrary to the law; (ii) whether the amount of RM500,000 was a reasonable compensation to remunerate the plaintiff for relinquishing his executive position in MKT; and (iii) whether the action was the same as the 1246 suit and/or principles of *res judicata*, estoppel and collateral estoppel were applicable.

Held (dismissing plaintiff's claim with costs):

(1) Based on the minutes, the BOD resolutions that were passed with respect to the decision to make MKT dormant and for the directors of MKT to resign was a sound business decision based on the losses of MKT which had 'bled' the group. The defendant being a public listed company was answerable to its shareholders and therefore, it would be irrational for the BOD to accede to the plaintiff's request to keep MKT afloat without any concrete proposals from the plaintiff to turn MKT around. The two directors were called to resign to avoid any further overheads to be incurred by MKT. (para 34)

(2) The paragraph of the company resolution which the plaintiff relied on to claim for compensation provides that 'any compensation, where applicable, payable to the Directors shall be in accordance with the labour law'. It was not an unqualified or unequivocal decision to pay compensation to the plaintiff. The phrase 'where applicable' qualified the obligation to pay and the payment, if made, must be in accordance with labour law. From the evidence, the plaintiff was not entitled to the compensation as he was earning more than RM1,500 per month. (para 35)

(3) The company resolution had made clear and specific reference to labour law. There was no basis for the plaintiff's contention that it was a ploy to avoid payment for compensation to the plaintiff. Based on the facts that led to the decision to ask the directors of MKT to resign and to make MKT dormant and taking into consideration the prohibition contained in s. 137(1) of the Act and the absence of any contract between the defendant and the plaintiff for compensation to enable the plaintiff to found a claim for compensation pursuant to s. 128(7) of the Act, the defendant had no obligation, in law and in fact, to compensate the plaintiff. (para 42)

(4) There was no evidence, documentary or otherwise, to support the sum of RM500,000 claimed by the plaintiff. Therefore, there was no merit for his claim of RM500,000 as reasonable compensation. (para 43)

(5) The plaintiff had abused the process of the court by raising, in these proceedings, matters which should have been litigated in the 1246 suit. The plaintiff had not given any satisfactory answers for filing the two separate suits seeking the same reliefs and pleading almost identical facts. Hence, *res judicata* in its wider sense applied. (paras 48 & 50)

[Editor's Note: The plaintiff's appeal to the Court of Appeal against the decision of the High Court in Civil Appeal No: W-02(NCVC)(W)-243-02-2014 was dismissed by the Court of Appeal]

Case(s) referred to:
Dato' Khalid Abdul Rahim v. Kelantan Match Factory Sdn Bhd [1981] CLJ 171A; [1981] CLJ (Rep) 138 HC ***(refd)***
Debenham's Ltd v. Perkins [1925] 133 LT 252 ***(refd)***
Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***
Henderson v. Henderson (1843) 3 Hare 100 ***(foll)***
Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd and Anor [1975] AC 581 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 128(7), 137(1), (5)(d)

Other source(s) referred to:
Pennington, *Company Law*, 2nd edn, pp 465, 466

For the plaintiff - Azhar Arman Ali; M/s Arman-Yunos
For the defendant - MV Kumar; M/s Mas Kumar

Reported by S Barathi

JUDGMENT

Hue Siew Kheng J:

[1] The plaintiff's claim against the defendant is for the sum of RM500,000 being purported compensation in consideration of the plaintiff's agreement to be dismissed by the defendant as an executive officer of a company named Metro Koats Technology Sdn Bhd ('MKT').

[2] It is not disputed that MKT had earlier filed suit against the plaintiff *vide* Civil Suit No. 22NCvC-1246-10/2012 ("the 1246 suit") wherein MKT had sued for the return of the company car which the plaintiff had refused to surrender. The plaintiff had also filed a counterclaim in the 1246 suit seeking for the payment of RM500,000 as compensation and the sum of RM45,254.75 being monies owing to the directors of MKT.

[3] The court had, in the 1246 suit ordered the return of the company car and payment of the sum of RM45,254.75 to the plaintiff. The plaintiff's counterclaim for compensation of RM500,000 was dismissed. No appeal was filed in respect of the decision handed down in the 1246 suit.

Plaintiff's Case

[4] The plaintiff at all material times was a shareholder and director of the defendant. He was also previously a shareholder and executive director of MKT.

[5] Sometime in 2004/2005 a corporate restructuring exercise was undertaken in which all the shares of MKT were transferred to the defendant, making MKT a wholly owned subsidiary of the defendant. The restructuring exercise was to facilitate the listing of the defendant on MESDAQ's stock exchange in Kuala Lumpur.

[6] In consideration of the plaintiff agreeing to the restructuring exercise the plaintiff was given shares in the defendant, appointed a director of the defendant company and remained as an executive director of MKT.

[7] On 19 December 2011 a special board of director's ("BOD") meeting was held by the defendant, wherein it was decided, *inter alia*, that MKT be made a dormant company and the plaintiff resign as an executive director of MKT and any compensation payable would be in accordance with labour law.

[8] At the plaintiff's request, implementation of the decision was deferred for the plaintiff to justify why MKT should not be made dormant. The special BOD meeting was then adjourned to 23 December 2011.

[9] On 23 December 2011 the plaintiff's "paperwork" (as described in the plaintiff's written submission) was presented to the BOD. The BOD did not agree with the plaintiffs paperwork and a resolution was passed to implement the decisions of 19 December 2011.The plaintiff then peacefully resigned as an executive director of MKT.

[10] The plaintiff contends that there is an implied contract entered into by the plaintiff and the defendant whereby, in consideration of the plaintiff peacefully relinquishing his executive position in MKT the plaintiff would be compensated in accordance with labour law by the defendant, as shown in para. 5.15 of the Minutes of The Adjourned Special BOD Meeting No. 6/2011.

[11] The plaintiff also contends that he is entitled to the sum of RM500,000 being reasonable compensation, based on the plaintiff's monthly salary, including allowances received, his contribution as the executive director in MKT since 1997 and also his contribution towards helping the defendant company to be listed.

[12] Alternatively, the plaintiff is entitled to reasonable compensation pursuant to s. 137(5)(d) and s. 128(7) of the Companies Act 1965.

The Defence

[13] At the Adjourned Special BOD meeting on 23 December 2011 the plaintiff and his co-director, Ho Siew Cheong had resigned willingly upon the BOD's decision to make MKT dormant and for the directors of MKT to resign. It was not a dismissal.

[14] The decision to make MKT a dormant company and for the directors of MKT to resign was a business decision based on the fact that MKT had been sustaining losses for some time and the plaintiff, despite being given time to turn the company around, had failed to do so. The defendant, being a public listed company is accountable to its shareholders.

[15] The defendant further contends that the plaintiff chose to disregard his duties as a director of the defendant, in that he had failed to attend any BOD meetings for 2012, including the AGM on 21 June 2012 wherein as a director of the defendant, a public listed company, he should have stood for re-election.

[16] The plaintiff, who is still a current shareholder of the defendant company owns four million shares. He had also become a millionaire from the listing and growth of the defendant. It is the defendant's contention that the plaintiff's conduct in filing this claim is motivated by bad faith and actuated by greed.

The 1246 Suit

[17] Since the plaintiff did not return the company car, MKT had commenced the 1246 suit. The plaintiff had confirmed in his evidence that he wilfully kept the company car "as lien" to twist the defendant's arm into paying some sort of compensation. However on 7 February 2012, the court ordered the company car be returned to the company which was done on 18 February 2013.

[18] The plaintiff had filed his defence and counterclaim on 3 December 2012 for these two claims:

(i) RM500,000 being compensation for his termination as director; and

(ii) RM45,254.75 being the amount owing to directors.

[19] Meanwhile on 13 December 2012, the plaintiff, without the defendant's knowledge, also filed this present suit against the defendant company for these two identical claims of RM500,000 for reasonable compensation and RM45,254.75 being the amount owing to the directors. The plaintiff obtained judgment in default before Y.A. Dato' VT Singham on 28 March 2013 and produced this order during the trial in the 1246 suit.

[20] When cross-examined the plaintiff was not able to give any explanation, reasonable or otherwise as to why he had two suits in two different courts on the same subject matter.

[21] The court in the 1246 suit took cognisance of this and confirmed with the learned counsel for the defendant in the 1246 suit (who is the plaintiff here) that the subject matter of both suits are identical.

[22] The defendant takes the position that the plaintiff's claim for compensation is untenable and cannot be sustained in light of, *inter alia*, the statutory provisions of the Companies Act 1965 particularly s. 137 and s. 128 and the facts and evidence adduced by way of the BOD minutes of 19 December 2011 and 23 December 2011.

[23] In addition to the above, in view of the decision handed down in the 1246 suit, the plaintiff's claim herein is an abuse of the process of court and constitutes a multiplicity of proceedings. The doctrine of *res judicata*, issue estoppel and collateral estoppel ought to apply.

Issues For Trial

[24] Parties agreed to the following three issues:

(i) Whether the defendant has an obligation to compensate the plaintiff in view of the resolutions which have been passed by the defendant's BOD on 19 December 2011 and 23 December 2011 and/or is such payment contrary to the law.

(ii) Whether the amount of RM500,000 is a reasonable compensation to remunerate the plaintiff for relinquishing his executive position in MKT.

(iii) Whether this present action is the same as the 1246 suit and/or the principles of *res judicata*, estoppel and collateral estoppel are applicable.

Issue 1: Whether The Defendant Has An Obligation To Compensate The Plaintiff

[25] This issue is twofold:

(i) Whether in view of the resolutions passed by the defendant's BOD on 19 December 2011 and 23 December 2011 there is such an obligation; and

(ii) Whether such payment is contrary to law, in particular the Companies Act 1965.

Company Resolutions Of The Special BOD Meetings Of 19 December 2011 And 23 December 2011

[26] The minutes of the 19 December 2011 BOD meeting show that the agenda of the meeting was to discuss the current status of MKT amidst the concern of the BOD that MKT's dismal performance was affecting the group overall results and cashflow. This is reflected in the following:

> 4.1 Without further ado, the Chairman invited Encik Yusseri Bin Said ("En Yusseri") and Mr. Ho Siew Cheong who are the Executive Directors of Metro Koats to brief the Board regarding the current status of Metro Koats Technology Berhad ("Metro Koats").
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> 4.2 Referring to his internal discussion with Management before this Board meeting, En. Yusseri said that he disagreed to the closure of the operation of Metro Koats.
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> 4.3 Mr. Periasamy s/o Sinakalai ("Mr. Perry") then informed the Board that he was not sure whether next year will be a good year and if Tex Cycle Technology (M) Berhad ("Tex Cycle" or "the Company") would pull through well as a Group. He explained that Metro Koats had been loss making for the past few years and there were not

enough projects to sustain the business of Metro Koats. Hence, the Management after much deliberation had proposed to close the operation of Metro Koats so that Metro Koats would not continue to lose money and adversely affect the Group's results and cashflow. The Company would take over the staff of Metro Koats. This would cut down the overheads of Metro Koats which then would remain a dormant company. In order to do this, the two executive directors of Metro Koats would have to vacate their seats as well.

4.4 However, En. Yusseri commented that Metro Koats still has business but admitted it was in rather small contracts which were insufficient to cover the overheads of Metro Koats. Hence, he said that the Board should not judge Metro Koats's future based on the past two years' non-performing result. He felt that the whole industry was affected. Furthermore, Metro Koats had experienced good performance in the earlier years i.e. from 1998 to 2005. Besides, Metro Koats would participate in next year's Ministry of Defense tender. Its present contract with Ministry of Defense ended in September 2011. Therefore, he wanted to know whether the Company wanted to close Metro Koats or close the paint operation or to inject new business into Metro Koats. En. Yusseri also felt that the infra-red paint business was still there. He also stressed to the Board that the infra-red paints was doing well in the past 10 years. Mr. Ravi pointed out that Metro Koats' business has not been doing well for the past two years.

4.5 En. Razali and En. Ravi both pointed out that the Audit Committee had highlighted to the Board some time back that Metro Koat's operation had been floundering and making losses from 2010 and the Audit Committee had expressed concern there and then and had also suggested that drastic action should be taken by Metro Koats to address the problem of declining revenue in the past two years but his recommendation had not been taken seriously by Metro Koats' Directors. Furthermore, in May 2011, both directors were asked to come up with a diversification plan by December 2011, and they had not come up with anything concrete to date.

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4.9 The Board noted that the annual overheads of Metro Koats are approximately RM390,000.00 and estimated losses to date for the current financial year would be over RM330,000.00.

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4.13 The Board also considered the comments of En. Yusseri regarding the difficulty to get Ministry of Finance licences, poor performance and prospect of Metro Koats' paint business, the inability of Mr. Ho Siew Cheong and En. Yusseri to get any substantial Ministry of Defense contracts or to get other viable business for Metro Koats. The Audit Committee and the Internal Auditor had over the last two years highlighted the company's over-dependence on only one product and one customer. The Board reckoned that due to the

bleak and challenging outlook next year, Metro Koats would find it extremely hard to get any contract from Ministry of Defense or other government agencies, or to find the water-proofing paint business verbally indicated by En. Yusseri to be profitable or viable at all. The Board also took into the account the recessionary outlook and uncertainty next year and what it should do in the best interest of the Company in this situation.

4.14 During the deliberation of the status of Metro Koats, the Board had considered various options; namely:

(a) close Metro Koats,

(b) close the business operation but continue to maintain Metro Koats as a dormant company; or

(c) allow Metro Koats to continue as it was making losses.

4.15 The Board also discussed and considered:

(i) whether the two directors could be re-employed?

(ii) compensation payable according to prevailing labour law?

(iii) what business can be injected into Metro Koats?

(iv) if none for the time being, what can be done?

4.16 After due consideration, it was agreed that the Company would retain Metro Koats as a separate legal entity. As far as the paint business was concerned it would be closed. Thereafter, Metro Koats would be a dormant company. The operation staff would be given jobs in the Company but the two Executive Directors, Mr. Ho Siew Cheong and En. Yusseri would have to go to avoid any further overheads to be incurred in Metro Koats. Any compensation, where applicable, in accordance with the labour law would be paid to the two Executive Directors.

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4.19 The Company Secretary representing the Board conveyed the Board's options to both Mr. Ho Siew Cheong and En. Yusseri. However, En. Yusseri requested the Board to give him a chance to make his justification and presentation on Metro Koats on the next meeting.

[27] The plaintiff then came up with the following justification:

The Board of Directors
Tex Cycle Technology (M) Berhad
No. 8, Jalan TPK 2/3
Taman Perindustrian Kinrara
47100 Puchong Selangor

22 December 2011

Re: Current Status of Metro Koats Technology Sdn Bhd (MKT)

With reference to the Special Board of Director's Meeting held on 19 December 2011, I would like to justify why the operations of MKT should not be closed.

Brief History

MKT has been in operations since 1995 from a rented factory and was incurring losses with negative cash flow and owing to directors of RM81,408 as at Financial Year Ending 31 March 1997. Shareholders' equity stood at RM183,837 (Paid-up capital was RM500,000), which more than half of the equity has been wiped out.

In 1997, Y.Bhg. Dato' Jaffar Mohamed and I joined MKT. Together with Mr Ho Siew Cheong, we were able to secure a contract amounting to more than RM3 million with MINDEF. MKT has grew from strength to strength and value per share has improved from 0.36 cents in 1997 to RM1.54 in 2003. MKT was able to purchase industrial land, constructed office and factory building from the profit generated. The property now worth more than RM1.5 million. Retained profit as at year ending 31 March 2005 is RM1.1 million. The directors of MKT have contributed positively toward the development and growth of the company. Furthermore, MKT has recorded good profit from year 1998 to year 2009. I'm of the opinion that the directors of MKT should not be penalised by vacating their seats just because of two years losses.

Reasons not to close the operations and dormant the company:

- Able to maintain continuity and business of MINDEF.
- The closure will automatically allow new suppliers to fill up the void.
- There are still on-going orders from MINDEFs' contractors doing maintenance of military vehicles and supplier of new assets purchase by MINDEF. Some of the contractors and suppliers are:
  - (i) DSSB (MMC Engineering Sdn. Bhd.)
  - (ii) Pesaka Astana Sdn. Bhd.
  - (iii) Deftech (DRB-Hicom)
  - (iv) Karisma Wira Sdn. Bhd.
  - (v) SKS Engineering

Hence, I would like to recommend the following for Board consideration:

1. To slimdown the operations of MKT to a sustainable level until new contract / business is secured.
2. Tex Cycle to sub-contract additional work to MKT rather than absorbed MKT staff to work for them. By this way, if there are orders for paint, the same staff can manufacture the paint.
3. To maintain existing directors and reduce their allowance to sustainable level until MKT's operation is back on track.
4. To produce water proofing paint for export market.

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5. To submit proposal to Mindef on privatization of maintenance of military vehicles with the collaboration of military vehicles manufacturer.

Consideration of the board is highly appreciated. Thank you.

Yours sincerely,

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t.t.

(Yusseri Said)

[28] Needless to say, the BOD was far from impressed. As reflected in the minutes of 23 December 2011:

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5.1 At the beginning of the meeting, Encik Yusseri Bin Said ("En. Yusseri") distributed a two-page work paper on the current status of Metro Koats Technology Sdn Bhd ("MKT"). He briefly went through the Brief History, Reasons Not To Close the Operations and Make The Company Dormant and His Recommendations.

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5.2 The Chairman asked En. Yusseri how he would propose to "slim down" the operation of MKT. En. Yusseri said that MKT could reduce cost, The Chairman asked "how"? En. Yusseri suggested cutting down salaries, entertainment expenses and the unnecessary costs. On the contrary, Mr. Ho Siew Cheong opined that there was no more unnecessary cost to be reduced. In reply to this, En. Yusseri said that he did not know the expenses that were paid out. However, Mr. Periasamy s/o Sinakalai ("Mr. Perry") told En. Yusseri that he should know because he is one of the cheque signatories, and the accounts and other documents are available for him to see. En. Yusseri said that he knows about the availability of the accounts.

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5.3 Mr. Ho Siew Cheong asked how En. Yusseri proposed to cut the salaries. En. Yusseri recommended that the staff's salaries be reduced. Mr. Ho Siew Cheong disagreed because he felt that the staff's salaries are already very low. The Board noted that one of the staff had left because of the low salary. En. Razali asked how much is the staff salary and how many staff MKT has. Mr. Ho Siew Cheong replied that MKT has only three staff with total salaries amounting to RM5,000.00.

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5.4 En. Yusseri also suggested cutting Directors' salary. He was asked how much to reduce. En. Yusseri said that he did not mind a salary of RM3,000.00 per month. However, Mr. Ho Siew Cheong felt that to be a director of MKT there is heavy responsibility and liability. He would resign rather than to remain as a director of MKT if he had to accept a lower salary. Mr. Perry asked if Mr. Ho Siew Cheong would rather be an employee of MKT. Mr. Ho Siew Cheong replied that if he was paid RM3,000.00, he could be better employed elsewhere.

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5.5 Mr. Ho Slew Cheong said that he would be very happy to see MKT survive. Unfortunately, he felt that the contract with the Ministry of Defense has lapsed and there is no continuity. Even for the last contract, MKT had only RM5 million contract. As an Executive Director of a manufacturing company, he was quite frustrated that MKT had to buy expensive material in anticipation of big valued contract which was subsequently reduced and there was no continuity of further contracts for the last two years. There was no continuity of the contract with the Ministry of Defence as MKT did not get anymore contract from them.

5.12 However, Mr. Ho Siew Cheong still held the stand that he would rather leave MKT instead of accepting a pay cut as he felt that he should not compromise his position as a professional. Mr. Perry then asked if Mr. Ho Siew Cheong were to leave, would MKT have the expertise. En. Yusseri commented that the Board should not make a decision based on their shareholding. Instead, En. Yusseri felt that the Board should keep MKT afloat and asked the Board again to give him one year to turnaround the Company. If he failed, En. Yusseri said that he will leave voluntarily. In reply, En. Yusseri was reminded that the Board comprised three independent non-executive directors and any decision made by the Board in respect of the closure of business in MKT was made after careful deliberation and was unbiased and unanimous. The decision of the Board was not based on the shareholding interest of the Executive Directors.

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5.14 During the deliberation of the status of MKT, the Board considered the following:

- There was no solid proposal tabled by En. Yusseri to the Board to support the continuing of MKT's business. En. Yusseri's recommendations were merely suggestions of what MKT could do.
- Both directors' salaries amounting to RM18,000.00 per month excluding EPF, etc, were heavy fixed cost for MKT to bear with no prospect of future business.
- The decision by the Board to close the business of MKT was purely a business decision devoid of emotion and sentiment.
- The Board felt that anymore pay cut to be imposed would be imposed on the MKT's directors rather than on the staff's salaries as the staff are already paid very low salaries.
- SKS is already doing the maintenance of military vehicles. Hence, the Board could not see how MKT could be able to get the award of the maintenance job.
- MKT has been making gross losses. The few contracts could not even cover the fixed overheads of RM30,000.00 per month.

- Prior to year 2010, MKT made profit because of contracts obtained *via* good contacts of and because MKT was given a government grant. The following table showed the Revenue and Net Profit of MKT from 2005 to 2011:

Year	RM Revenue	RM Net Profit	RM Revenue derived from businesses given by Tex Cycle Sdn. Bhd.
2005	1,383,916.00	132,152.00	191,217.40
2006	1,795,255.00	96,255.00	343,844.80
2007	1,186,946.00	32,161.00	221,990.25
2008	1,593,404.00	392,237.00	144,613.50
2009	2,909,863.00	896,845.00	102,062.00
2010	379,128.00	(514,694.00)	55,533.00
2011	237,280.00	(279,087.00)	22,733.00

The Board noted that without the revenue given by Tex Cycle Sdn. Bhd., MKT would have made losses in 2005, 2006 and 2007. Therefore, except for 2008 and 2009 and if without revenue from Tex Cycle Sdn. Bhd., MKT was technically making losses in all the years between 2005 and 2011.

- The Board has to be responsible to the shareholders and would have to face questions on MKT at the annual general meeting. Hence, the Board has to make the decision to stop the "bleeding". This is the decision of the Board based on the losses of MKT and not the decision from the major shareholders which En. Yusseri should understand.

- Moreover, for the past two years new vendors had moved in to supply to the Ministry of Defence and MKT was only awarded with very small contracts; insufficient to cover MKT's overheads. MKT's position in the Ministry of Defence had been filed by others and only RM1.5 million of the latest RM5 million contract was actually fulfilled by orders from Mindef.

5.15 After some careful deliberation, it was unanimously RESOLVED THAT:

(a) The Company should retain MKT as a separate legal entity.

(b) The business operation of MKT shall be closed with effect from 31 December 2011. Thereafter, MKT shall be a dormant company.

(c) The three operations staff shall resign from MKT but shall be re-employed by the Company. The two Executive Directors, Mr. Ho Siew Cheong and En. Yusseri shall resign or have their services terminated as the case maybe to avoid any further overheads to be incurred by MKT.

(d) **Any compensation, where applicable, payable to the Directors shall be in accordance with the labour law**. MKT may work with En. Yusseri again whenever he has any contract which MKT is able to do profitably.

...

5.18 The above decisions of the Board were unanimously and amicably agreed by both En. Yusseri and Mr. Ho Siew Cheong. Both En. Yusseri and Mr. Ho Siew Cheong agree to resign. As for future contracts which En. Yusseri may be able to secure, it was agreed that these contracts may be referred to MKT. Thereafter, the Board left it to Mr. Perry to have an amicable discussion with En. Yusseri after the Board meeting. This was unanimously agreed.

(emphasis added)

[29] It is interesting to note that his co-director Ho Siew Cheong was not with him in a number of the plaintiff's proposals as shown in paras. 5.3, 5.4, 5.6 and 5.12 of the minutes.

Findings

Issue 1: Defendant's Obligation To Compensate The Plaintiff

[30] DW1, Periasamy s/o Sinakalai, the group managing director of the defendant, had testified that the plaintiff, despite being given six months, from May 2011 to come up with proposals (referred to in 19 December 2011 Minutes as "a diversification plan" (see para. 4.5)) to turn around MKT the plaintiff failed to do so. This evidence was not challenged. Although the plaintiff had sought for a last minute reprieve and be given a chance to justify why MKT should not be made a dormant company, which was acceded to by the BOD, he could not come up with any concrete proposals as demonstrated in his two pages work paper. As noted in the minutes, he was merely suggesting what MKT could do as can be seen from the penultimate paragraph of his paper.

[31] DW1 testified that labour law does not cover any person receiving more than RM1,500 in remuneration or wages. The plaintiff had said that he was receiving a salary of RM9,000 per month. As such, the plaintiff is not entitled to compensation.

[32] The fact that labour law does not extend to cover employees earning more than RM1,500 per month was not disputed by the plaintiff. Learned counsel for the plaintiff has submitted as follows: (in para. 26 of the plaintiff's written submission)

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26. We submit that the defendant merely hides behind the confused wordings of "Labour Law" in the Minutes of Adjourned Special Board of Directors' Meeting dated 23 December 2011. This is in order to avoid their obligation to pay the compensation promised to the plaintiff. It is clear that those excuses given by the defendant are baseless. If the defendant was sincere in its decision to close down the operation of Metro Koats and to compensate the plaintiff, the defendant should deliberate further on how to realize the promise which was resolved during the Special Board Meeting.

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[33] From the cross-examination of DW1 however, it was never put to him that the words "Labour Law" found in the minutes were to confuse or to avoid the defendant's obligation to pay the compensation promised to the plaintiff. I can find no evidence to support the plaintiff's contention that these are "baseless excuses" given by the defendant.

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[34] From the minutes of the BOD dated 19 December 2011 and 23 December 2011 I am of the view that the BOD resolutions that were passed with respect to the decision to make MKT dormant and for the directors of MKT to resign to be a sound business decision based on the losses of MKT which had "bled" the group. The defendant being a public listed company is answerable to its shareholders and it would be irrational for the BOD to accede to the plaintiff's request to keep MKT afloat without any concrete proposals from the plaintiff to turn MKT around. The two directors were called to resign to avoid any further overheads to be incurred by MKT, which they did willingly. This is not disputed.

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[35] The plaintiff relies on the company resolution to pay him compensation as contained in para. 5.15(d) of the company resolution dated 23 December 2011. It must be noted that the paragraph that the plaintiff relies on provides that "Any compensation, where applicable, payable to the Directors shall be in accordance with the labour law". It is not an unqualified or unequivocal decision to pay compensation to the plaintiff. First of all, the phrase "where applicable" qualifies the obligation to pay and secondly, the payment, if made, must be in accordance with labour law, which, from the evidence, the plaintiff is not entitled to, as he was earning more than RM1,500 per month.

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[36] The plaintiff however is claiming alternatively that he is entitled to "reasonable compensation" pursuant to s. 137(5)(d) and s. 128(7) of the Companies Act 1965 (the Act).

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[37] Section 137 of the Act provides:

Payment to directors for loss of office, etc.

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(1) It shall not be lawful

(a) For a company to make any director any payment by way of compensation for loss of office as an officer of that company or of a subsidiary of that company or as consideration for or in connection with his retirement from any such office; or

...

As to payments to directors

(5) Any reference in this section to payments to any director of a company by way of compensation for loss of office or as consideration for or in connection with his retirement from office shall not include:

(d) any *bona fide* payment by way of pension or lump sum payment in respect of past services, including any superannuation retiring allowance, superannuation, gratuity or similar payment, where the value or amount of the pension or payment (except so far as it is attributable to contributions made by the directors) does not exceed the total emoluments of the director in the three years immediately preceding his retirement or death; or

[38] Section 128(7) was considered by the court in *Dato' Khalid Abdul Rahim v. Kelantan Match Factory Sdn Bhd* [1981] CLJ 171A; [1981] CLJ (Rep) 138; where a similar issue arose as to whether a director who is also an employee of the company is entitled to compensation under s. 128(7) of the Companies Act 1965. Section 128(7) reads:

Nothing in subsections (1) to (6) shall be taken as depriving a person removed thereunder of compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director or as derogating from any power to remove a director which may exist apart from this section.

[39] The plaintiff's counsel had asked the court in *Dato' Khalid*'s case to infer from the said section that a director was entitled to compensation in the event of his early retirement by the company notwithstanding that s. 128 of the Act was applicable to a public company. The defendant's counsel submitted that whether or not a director was entitled to compensation from the company depended on the contract between the parties. He said that in this case there was no separate contract between them providing for such compensation and as such the articles were the only contract between the parties which were silent on the question of compensation and therefore the plaintiff was not entitled to compensation. He referred to *Company Law* by Pennington, 2nd edn, pp. 465 and 466.

[40] The court held:

(1) Compensation is not something accruable as a matter of course without there being a contract to base on it.

(2) Section 128(7) of the Companies Act does not provide the necessary cause of action. This section merely states that a dismissed director cannot be precluded from suing for compensation or damages if payable to him. This presupposes the prerequisite cause of action must be present either in contract or tort on which to base his claim.

A (3) If a removed director is not in the position to sue for damages unless it is provided for in the contract, either in separate contract or in the articles themselves, it follows that such person cannot sue for compensation, which is essentially based on contract, unless it is so provided in the contract.

B **[41]** The plaintiff contends that he is entitled to "reasonable compensation" by virtue of the defendant's resolution to pay him compensation which, the plaintiff argues, constitutes an implied contract entered into between the plaintiff and the defendant whereby in consideration of the plaintiff peacefully relinquishing his executive position in MKT, the plaintiff would C be compensated accordingly.

[42] With respect, the company resolution has made clear and specific reference to labour law. There is no basis for the plaintiffs contention that it was a ploy to avoid payment of compensation to the plaintiff. Given the background facts that led to the decision to ask the directors of MKT to D resign and to make MKT dormant and taking into consideration the prohibition contained in s. 137(1) of the Act and the absence of any contract between the defendant and the plaintiff for compensation to enable the plaintiff to found a claim for compensation pursuant to s. 128(7) of the Act, I hold that the defendant has no obligation, in law and in fact, to compensate E the plaintiff.

Issue 2: Whether The Amount Of RM500,000.00 Is Reasonable Compensation

[43] In view of my finding that no compensation is due and payable to the plaintiff, this issue is now academic. However, for completeness, my findings briefly are as follows:

F

(i) In respect of the compensation now claimed by the plaintiff his evidence in chief was:

12. S: Sila rujuk kepada emel bertarikh 24.12.2011 di mukasurat 489 Ikatan Dokumen Bersama Jilid 2 Bahagian B. Sila terangkan kepada Mahkamah dokumen ini. G

J Ini adalah emel yang telah saya hantar kepada En. Periasamy a/l Sinakalai sehari selepas Mesyuarat Khas Ahli Lembaga Pengarah Defendan pada 23.12.2011. Selepas mesyuarat 23.12.2011 selesai, saya secara 'informal' telah berbual dengan En. Periasamy. En. Periasamy ialah H Pengarah Urusan Kumpulan Defendan. Saya bertanya En. Periasamy berapakah jumlah pampasan yang akan diberikan kepada saya atas keputusan Ahli Lembaga Pengarah Defendan supaya saya diberhentikan dari menjadi pengarah dan pegawai eksekutif Metro Koats?

I Secara 'informal' En. Periasamy memberikan satu jumlah yang memeranjatkan saya iaitu RM90,000.00. Saya berasa amat terkejut. Pada pendapat saya, pembabitan saya secara positif telah dapat membantu Metro Koats dari tahun 1997

> hingga Disember 2011 dari segi kutipan keuntungan. Walhal, syarikat Metro Koats telah dapat membantu Defendan disenaraikan di Bursa Malaysia. Pada pendapat saya, pampasan yang memadai untuk saya dengan mengambil kira penglibatan saya yang lebih 10 tahun di syarikat Metro Koats dan kemudian di Defendant selepas Defendan ditubuhkan, adalah sebanyakRM500,000.00. Oleh yang demikian, saya telah menulis emel bertarikh 24.12.2011 kepada En. Periasamy tersebut.

(ii) It is not disputed that the RM90,000 that was offered to the plaintiff by DW1 was turned down by the plaintiff.

(iii) I agree with the defendant that the plaintiffs figure of RM500,000 is arbitrary and there is no evidence documentary or otherwise to support the sum of RM500,000.

(iv) The plaintiff was not victimized nor suffered financially at all by the restructuring exercise – he had benefited greatly from the shares exchange deal and as submitted by the defendant is now a millionaire. The reason for the decision to make MKT dormant is also due to his inability to come up with any concrete proposals to turn around MKT which had been floundering for two years. Furthermore, by failing to attend the AGM of the defendant company, he had, by his own election, chose not to be re-appointed as director. He was not dismissed as a director of the defendant company.

(v) I find there is no merit nor basis for his claim of RM500,000 as reasonable compensation.

Issue 3: Whether This Action Is The Same As The 1246 Suit And/Or Res Judicata And Estoppel Apply

[44] The defendant has cited the case of *Henderson v. Henderson* (1843) 3 Hare 100 wherein Wigram V.0 opined:

> ... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to **every point which properly belonged to the subject of litigation**, and which the parties, exercising reasonable diligence, might have brought forward at the time.
>
> (emphasis added)

[45] It is submitted at para. 13 of the defendant's submission:

> 13. Therefore, it not only bars re-litigation of issues that were litigated but, as Wigram V.0 held, ft also bars the litigation of issues that were not litigated. That is why his well known statement was part of the ratio. The Henderson principle is therefore fundamental to cause of action estoppel rather than ancillary. It defines the effect of such an estoppel.

[46] The Vice Chancellor's phrase "every point which properly belonged to the subject of litigation" was expanded in *Greenhalgh v. Mallard* [1947] 2 All ER 255, at p. 257, by Somervell LJ:

> ... *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

[47] Applying the *Henderson* rule, the House of Lords in *Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd and Anor* [1975] AC 581 held that it was an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings. In *Yat Tung*'s case the appellant had earlier sued the respondent bank for selling its property which had been charged to the bank. Having failed in the first suit, it then brought a second suit against not only the bank but also the purchaser of the said property. In dismissing the appeal, the House of Lords held that there was no reason why a defence impugning the *bona fides* of the sale by the bank to the purchaser could not have been pleaded as a counterclaim in the earlier suit. The doctrine of *res judicata* in its wider sense was applied.

[48] I concur with the defendant that the *Henderson* principle applies in this case. The plaintiff has abused the process of the court by raising in these proceedings matters which should have been litigated in the 1246 suit. This is a clear cut case of an abuse of the process of the court as the statement of claim of this suit and the 1246 suit and the statement of agreed facts are almost identical. The plaintiff's evidence for both suits are materially the same, as can be seen from the witness statements filed. *Res judicata* in its wider sense as expounded in *Yat Tung*'s case applies.

[49] The defendant has also advanced the argument that applying the principle laid down in *Debenham's Ltd v. Perkins* [1925] 133 LT 252 in respect of the doctrine of election, there is a merger of judgment in this case with the earlier suit.

[50] This is disputed by learned counsel for the plaintiff who had submitted *Debenham*'s case does not apply here because "It is our stand that the liability to compensate rests on the defendant and not on Metro Koats" (see para. 19).

This then begs the question why the plaintiff had filed his counterclaim in the 1246 suit against Metro Koats for the same claim of RM500,000 as compensation. The plaintiff herein has not given any satisfactory answers for filing these two separate suits seeking the same reliefs and pleading almost identical facts. The matters raised here could and should have been raised in the 1246 suit as they are similar, if not identical, in nature. *Yat Tung*'s case is clear: this is an abuse of the process of the court. The plaintiff is clearly having a second bite at another cherry.

[51] Taking all these factors into consideration, I find that the plaintiff's claim is without basis and cannot be sustained.

[52] Accordingly, the plaintiff's claim is dismissed with costs.